IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

JEFFERSON COUNTY BOARD OF ZONING APPEALS,	)	
Petitioner,	)	
v.	)	**Supreme Court Docket No. 071869** **(Jefferson County Circuit Court Case No. 06-C-195)**
THE HONORABLE CHRISTOPHER C. WILKES, JUDGE OF THE TWENTY-THIRD JUDICIAL CIRCUIT, HIGHLAND FARM, LLC and THORNHILL, LLC,	)	
Respondents.	)	

HIGHLAND FARM, LLC AND THORNHILL, LLC'S
RESPONSE TO RULE TO SHOW CAUSE

COME NOW, Highland Farm, LLC and Thornhill, LLC (collectively, "Thornhill"), by counsel, and file the following Response to the Rule to Show Cause issued with regard to the Jefferson County Board of Zoning Appeals' ("BZA") Petition for Writ of Prohibition (the "Petition") in this matter, and state in support thereof as follows:

I. SUMMARY OF THE CASE

Thornhill initiated the instant action against the BZA because the BZA refused to take action on the compatibility process before the BZA as a result of a compatibility conference before the staff of the Planning Commission on February 22, 2006. Specifically, in accordance with Article 7.6 of the Jefferson County

Zoning Ordinance (the "Ordinance") "*adjacent and confronting property owners and all other interested parties*" met with the applicant with regard to such parties' concerns about the application. In accordance with Section 7.6(e) of the Ordinance, if parties' concerns were not resolved at the compatibility conference, the BZA was obligated to hear and determine the unresolved issues[1] in accordance with Section 7.6(e) of the Ordinance. Accordingly, the issues to be determined by the BZA were not established until February 22, 2006.

It is undisputed that attorney J. Michael Cassell's employment with the Jefferson County Prosecuting Attorney's office ended on January 31, 2005, more than a year before the "*unresolved issues*" were determined. Further, it is undisputed that the BZA did not have responsibility for "*unresolved issues*" pursuant to Section 7.6(e) of the Ordinance when Mr. Cassell served as their counsel. Specifically, in April of 2005, the Ordinance was amended and shifted responsibility for compatibility pursuant to Article 7 from the Planning Commission to the BZA. Simply stated, when Mr. Cassell represented the BZA, the BZA did not have any responsibility for the compatibility process and resulting "*unresolved issues*."

On November 21, 2006, the Circuit Court of Jefferson County, the Honorable Christopher C. Wilkes presiding, conducted a full day evidentiary hearing on the issues joined in the Motion to Disqualify (the "Motion").

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[1] Because the Ordinance does not provide any guidance, unresolved issues apparently can be any demand by a citizen — without limitation.

Following that hearing, by Order dated January 16, 2007 (the "Order"), Judge Wilkes denied the Motion and made specific Findings of Fact and Conclusions of Law analyzing the requirements of Rules 1.9 and 1.11(a) of the West Virginia Rules of Professional Conduct. The Court painstakingly identified the standard for the determination of a "*substantially related matter*" and concluded specifically that Mr. Cassell's representation of the BZA in relation to the LESA evaluation, pursuant to Article 6 of the Zoning Ordinance, prior to Mr. Cassell's resignation on January 31, 2005 was not "*substantially related*" to the compatibility process and resulting "*unresolved issues*" pursuant to Article 7 of the Ordinance. Further, the Circuit Court found specifically that "*Mr. Cassell represented the BZA in a different matter than the instant proceeding.*" *See* Order at page 23.

II. SUMMARY OF THE ARGUMENT

Prohibition is only appropriate when a lower court's order is clearly erroneous; the lower court's order repeats an error or manifests a disregard for procedural and substantive law; and such order raises new and important problems or issues of law of first impression.

The Circuit Court of Jefferson County collected facts necessary to determine whether or not the "*facts, circumstances and legal issues*" relevant to Mr. Cassell's representation of the BZA prior to January 31, 2005 were substantially related to the "*facts, circumstances and legal issues*" related to unresolved issues at compatibility on May 16, 2006. Because the issues were

unrelated and because the BZA did not have jurisdiction over unresolved issues prior to April of 2005, the Motion was properly denied by the Circuit Court.

Because the issues below were determined on a disputed factual record, and no credible evidence indicates that the Court ignored established principles of law, the Circuit Court's Order denying the Motion to Disqualify should be affirmed.

III. STATEMENT OF THE FACTS

Thornhill and Highland Farm respectfully contend that the BZA identified facts in their Petition that were not presented to the Circuit Court and therefore cannot be properly reviewed by this Honorable Court. In addition, it is respectfully contended that many of the facts identified in the Petition simply are not relevant to the Motion to Disqualify.

A. Mr. Cassell's Prior Representation was Unrelated to the Compatibility Process

Mr. Cassell's prior representation of the BZA in relation to Thornhill related to an appeal brought by citizens to challenge the LESA Score assessed by the Zoning Administrator. It is clear from the record from the Circuit Court that the BZA did not determine or address the Conditional Use Permit for the Highland Farm – Thornhill II Application.

Exhibit A attached in the appendix hereto is a copy of Article 6 of the Ordinance, which identifies the factors to be evaluated in what is known as the LESA process. The LESA scoring at issue in the appeal handled by Mr. Cassell is reproduced as follows:

		Score assessed by Zoning Administrator	*Scored claimed by Applicant*[2]
1.	*Soils*	*12.72*	*12.72*
2.	*Size of Site*	*6*	*6*
3.	***Adjacent Development***	***4***	***10***
4.	*Distance to Growth Corridor*	*0*	*0*
5.	*Comprehensive Plan Compatibility*		
6.	*a. highway problem areas*	*4*	*4*
	b. historical and recreational	***1***	***2***
	c. land use compatibility	***1***	***2***
6.	*Proximity to Schools*	*9*	*9*
7.	*Public Water Availability*	*0*	*0*
8.	***Public Sewer Availability***	***0***	***11***
9.	*Roadway Adequacy*	*6*	*6*
10.	***Emergency Service Availability***	***2***	***3***
	TOTAL	*45.72*	*64.72*

Emphasis added where the Appellant's claimed score was different than the Zoning Administrator's claimed score.

The compatibility process arises pursuant to Article 7 of the Ordinance and Sections 7.6(b) and 7.6(e), in particular. Article 7 is attached hereto as Exhibit B. The compatibility process arose from a February 22, 2006 conference of Thornhill, Jefferson County staff and a number of citizens who raised the issues that were unresolved following the conference. The staff report generated following the compatibility process is attached hereto as Exhibit C. A comparison of the facts and circumstances at LESA pursuant to Article 6 and of compatibility pursuant to Article 7 is discussed at length in the argument section of this memorandum.

[2] "Applicant" for the purposes of the form is the appellant. In the case of Thornhill, citizens who appealed the Zoning Administrator's LESA score assessment were the appellants.

B. The Compatibility Process is a Different Matter

On March 6, 2006 Prosecutor Michael D. Thompson first raised the issue of Mr. Cassell's conflict. After seeking the advice of Robert H. Davis, Jr., an ethics expert, Campbell Miller Zimmerman responded to Mr. Thompson's letter to dispute Mr. Thompson's allegations. A copy of this letter is attached hereto as Exhibit D. From the moment the issue was raised on March 9, 2006, Campbell Miller Zimmerman has vehemently asserted that the Compatibility Assessment process is not the same "*matter*" as the LESA process pursuant to the Jefferson County Zoning Ordinance (the "Ordinance"). On a fully developed factual record, the Circuit Court so ruled in its Order dated January 16, 2007 that:

> *Plaintiffs' expert, Mr. Davis, testified that the evaluation of whether or not a project was the same matter required more than a general review. [Citation omitted.] Furthermore, the Compatibility process is not the same matter as the LESA process because Compatibility addresses completely different issues than LESA, and the BZA did not handle Compatibility during Mr. Cassell's tenure. [Citation omitted.] The appeal of Thornhill's LESA score entailed the measurement of adjacent development, historical, recreational, and land use compatibility, public sewer and emergency service available and adequate support data. [Citation omitted.]*

See January 16, 2007 Order of the Circuit Court denying the Motion to Disqualify (the "Order") at pages 21-22.

> *This Court agrees with the Court of Appeals and finds that Mr. Cassell represented the BZA in a different matter than the instant proceeding. Therefore, this Court finds no violation of Rule 1.11(a).*

See Order at page 23.

C. The *Latterell* Matter is Completely Unrelated to the BZA

The BZA also makes reference to a separate Civil Action, *Thornhill, LLC et. al v. Richard Latterell, et. al*, Jefferson County No. 04-C-191. Mr. Cassell did appear at a deposition in this case. The BZA is not a party in that litigation. Further, the *Latterell* litigation is not relevant to any issue related to the issues joined in this proceeding.

D. Other "*Letters*" Were Not Before the Circuit Court and Are Not Before this Court

The BZA also describes correspondence by Mr. Cassell to various County staff members. However, remarkably, no such letters were presented into evidence at the hearing before the Circuit Court. The alleged content of said letters can be of little utility in a Writ to this Honorable Court when the letters were not offered into evidence at the Circuit Court nor submitted to this Court in the Petition.

E. The Facts Relating to Compatibility Came into Existence More Than a Year After the End of Mr. Cassell's Representation of the BZA

On February 22, 2006, the staff at the Department conducted a public hearing regarding the compatibility assessment process. At the conclusion of the meeting, the staff wrote a detailed report outlining fifty nine (59) unresolved issues which were to be handled by the BZA.

The fifty-nine (59) issues set forth in the staff report attached as Exhibit C frame the "*unresolved issues*" to be resolved by the BZA at the hearing scheduled for May 16, 2006.

It was undisputed at the hearing before the Circuit Court that during Mr. Cassell's tenure representing the BZA, the Planning Commission, rather than the BZA, had jurisdiction for the resolution of "*unresolved issues*" at "*compatibility*." Clearly, Mr. Cassell did not have the opportunity, prior to January 31, 2005, to consult or advise the BZA with regard to "*unresolved issues*" at "*compatibility*" as defined by the Ordinance — because the BZA had no duties with regard to that process during Mr. Cassell's representation.

In addition, as stated elsewhere in this memorandum, the "*unresolved issues*" could not be the same subject matter as LESA (or for any other part of the land development process) because the "*unresolved issues*" did not come into existence until the dialogue with citizens who raised the issues on February 22, 2006.[3]

F. The Representation of the *Quasi*-Judicial Body

A BZA is a *quasi*- judicial body that acts exclusively upon discrete appeals filed, pertaining to a specific issues. No evidence was presented to the Circuit Court that Mr. Cassell obtained any confidential information in relation to **any** matter ever before the BZA. Accordingly, no evidence was presented that Mr.

[3] The staff report summarizes the unresolved issues, many of which are outrageous in the scope of their demands. This fact was important to the Circuit Court in finding that the unresolved issues were, in fact, unrelated to LESA.

Cassell received confidential information prior to January 31, 2005 about the "*compatibility process*" which did not become part of the BZA's responsibility until April of 2005.

The only witness called by the BZA was Thomas Trumble, a member of the BZA during Mr. Cassell's representation. Mr. Trumble testified that he could not recall any secrets or confidences between the BZA and Mr. Cassell in relation to Thornhill. *See* Trumble testimony at page 46 of the Transcript.

G. Campbell Miller Zimmerman Continued the Representation Following Advice from Robert Davis

The Circuit Court received expert testimony from Robert H. Davis, Jr., who not only served as an expert at the hearing, but advised Campbell Miller Zimmerman regarding their responsibilities after the Jefferson County Prosecuting Attorney raised the issue of conflict and subsequent disqualification. In fact, the Circuit Court noted in its Order that when responding in writing to the Prosecuting Attorney's claim of conflict, Campbell Miller Zimmerman asserted that the matters were not related after receiving advice from Mr. Davis.

In their Argument, the BZA seeks to relitigate the battle of the experts. However, the experts did not disagree about the ethical rules at issue — rather they disagreed about the facts. Clearly and unquestionably, the resolution of the factual dispute was the issue for the Court — which agreed with the factual conclusion reached by Mr. Davis as set forth in his testimony at the hearing:

> *[M]y understanding is that the analysis of what a matter is still looks in a sophisticated way at the elements; who are the parties that*

> *are involved, what are the legal issues involved, and you know, what is the overall factual nature to what's going on, or the facts – I think Ogden Newspapers, the facts and circumstances, you've got to look at them, you have to look at them carefully and analyze them. That's where my general disagreement with Mr. Karlin and his employers come. I think it's too facile to say Thornhill, therefore, this magic curse, I think you have to look at what was going on at this discrete moment that they say Mr. Cassell was disqualified; therefore, I disagree. I think the way to look at this at least in an agreed, national approach is to look at it very very carefully.*

See Transcript at page 191.

Further, at page 192 of the Transcript, Mr. Davis states as follows:

> *Again, the goals with regard to this Rule are to protect public confidence but not to the extent that it completely disqualifies a person from frankly moving out of government and providing his services to a client outside of government and to revise some sort of manner in which they can do that so they are not totally disqualified from the thing they know how to do.*

IV. ARGUMENT

A. The Circuit Court Followed the Process at Disqualification Mandated by *Ogden II*

The Honorable Christopher C. Wilkes was the presiding judge in two (2) other notable West Virginia cases wherein prohibition was sought in relation to disqualification motions. In *Ogden Newspapers v. Wilkes*, 198 W.Va. 587, 482 S.E.2d 204 (1996) ("*Ogden I*"), Judge Wilkes denied motions to disqualify and such motions were then the subject of a Writ of Prohibition to this Honorable Court. In *Ogden I*, the Supreme Court concluded from a record under seal that the attorneys sought to be disqualified "*reasonably could have learned confidential information*" which could have been utilized to the detriment of their former

client, Ogden. Accordingly, the Writ was granted, reversing the Circuit Court on the issue of disqualification.

Six (6) years later in *Ogden Newspapers v. Wilkes*, 211 W.Va. 423, 566 S.E.2d 560 (2002) ("*Ogden II*"), the matter of disqualification once again came before Judge Wilkes, sitting in the Circuit Court of Berkeley County, involving the very same lawyers as in *Ogden I*.[4]

In *Ogden II*, Judge Wilkes denied the motion to disqualify following an evidentiary hearing, finding, in part, that the passage of time from plaintiff's counsel's representation of Ogden was relevant in determining whether Rule 1.9 mandated disqualification. In *Ogden II*, this Court affirmed the Circuit Court. In both *Ogden I* and *Ogden II*, this Honorable Court referred to *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993), which explained "*that under Rule 1.9(a) of the Rules of Professional Conduct, determining whether an attorney's current representation involves a substantially related matter that of a former client requires an analysis of the* ***facts, circumstances, and legal issues of the two representations.***" (Emphasis added.) *See Ogden I* at 208 and *Ogden II* at 427.

The Circuit Court, in this instance, being well aware of the specific guidance from the *Ogden* cases, conducted a painstaking analysis of the facts, circumstances and legal issues involved and determined that no substantial

[4] Although *Ogden II* involved the same lawyers, the plaintiff in *Ogden II* was a different individual.

relationship existed and that there was no violation of Rules 1.9 or 1.11. The fact that the Court conducted such a painstaking analysis is inappropriately ignored by the BZA in its Petition for Writ of Prohibition.

B. The Petition Fails to Allege the Factors for the Issuance of a Writ

Prohibition is an appropriate process when a motion to disqualify is denied. This is confirmed by *Ogden I and II* and recently in *State ex rel. Blackhawk Enterprises v. Bloom*, 219 W.Va. 333, 633 S.E.2d 278 (2006).

The standard for review on such a petition is clearly established. In cases not involving an abuse of jurisdiction, this Honorable Court will examine the following five (5) factors:

> *(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.*

Id. at 282.

Without question, the instant Petition does not satisfy factors 3, 4 or 5. Specifically, pursuant to factor 3, the Circuit Court is not clearly erroneous as a matter of law as it applied the analysis mandated by *Ogden* and determined that the "*facts, circumstances and legal issues of the two representations*" were not related at all, much less substantially related. In addition, the Petition does not

satisfy factor 4 as there is no allegation that the "*lower tribunal's order is an oft repeated error*" or a "*persistent disregard for procedural or substantive law,*" rather, the Court conducted the analysis mandated by *Ogden I and II.* Finally, factor 5 is not satisfied by the allegations in the Petition because the lower court's order does not raise "*new and important problems or issues of law of first impression.*"

In *Engle v. Black*, 164 W.Va. 112, 262 S.E. 2d 744 (1979), the Court clarified the use of prohibition:

> *This Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a* ***clear statutory, constitutional or common law mandates which may be resolved independently of any disputed facts*** *and only in cases where there is a high probability that the trial court will be completely reversed if the error is not corrected in advance.* (Emphasis added.)

Because the Circuit Court painstakingly followed the guidance of *Ogden*, clear cut legal errors are simply not before the Court. Further, the issues raised by the BZA cannot be resolved independently of disputed facts.

C. Relevant Sections of the Ordinance Which Form the Basis to Determine Whether the Matters are Substantially Related

The development review process, pursuant to the Ordinance, is a linear, sequential process. An applicant must obtain an approval in each stage of the process before moving to the next. Property such as the Thornhill property may not be developed until and unless a Conditional Use Permit ("CUP") is issued. The first step in obtaining a CUP is known as the LESA assessment process. If

the LESA score is less than sixty (60) as provided for in Section 6.2 of the Ordinance, an applicant may continue to the next stage of the process.

If an applicant successfully negotiates the LESA scoring process, it may proceed with a compatibility assessment as provided for in Section 7.6 of the Ordinance. The compatibility assessment meeting allows "*adjacent and confronting property owners and all other interested parties*" the opportunity to raise concerns about the project and seek modifications from the applicant with respect to those concerns. If matters raised by the public at the compatibility meeting remain unresolved, the BZA must hear and determine the matter pursuant to Section 7.6(e) of the Ordinance.[5] The distinctions between the LESA process and compatibility will be addressed hereinafter.

D. <u>The Elements of the LESA Point Evaluation</u>

A copy of Article 6 of the Ordinance is attached hereto as Exhibit A. The LESA scoring system has several significant elements which result in points being assessed to the project. Such as with golf, a low score is good. A copy of the LESA Appeal form presented to the BZA is attached hereto as Exhibit E. This is the appeal in which Mr. Cassell advised the BZA. The scoring totals are reproduced as follows:

[5] Prior to April of 2005, the resolution of unresolved issues at compatibility was presented to the Planning Commission. The BZA did not have any jurisdiction or responsibility for the compatibility process when Mr. Cassell served as their counsel prior to January of 2005.

		Score assessed by Zoning Administrator	*Scored claimed by Applicant*[6]
1.	*Soils*	*12.72*	*12.72*
2.	*Size of Site*	*6*	*6*
3.	***Adjacent Development***	***4***	***10***
4.	*Distance to Growth Corridor*	*0*	*0*
5.	*Comprehensive Plan Compatibility*		
6.	*a. highway problem areas*	*4*	*4*
	d. historical and recreational	***1***	***2***
	e. land use compatibility	***1***	***2***
6.	*Proximity to Schools*	*9*	*9*
7.	*Public Water Availability*	*0*	*0*
8.	***Public Sewer Availability***	***0***	***11***
9.	*Roadway Adequacy*	*6*	*6*
10.	***Emergency Service Availability***	*2*	*3*
	TOTAL	*45.72*	*64.72*

Emphasis added where the Appellant's claimed score was different than the Zoning Administrator's claimed score.

A score of over sixty (60) will result in the application being denied. The relevant points include the following:

1. Soils Assessment (Section 6.3)

The most significant point assessment relates to soils and points are evaluated based upon the table identified in Section 6.3. In the Thornhill LESA points evaluation, the Zoning Administrator assessed 12.72 points to Thornhill in relation to the Soils Assessment. This assessment was not at issue in the appeal addressed by citizens in which Mr. Cassell served as counsel to the BZA.

[6] "Applicant" for the purposes of the form is the appellant. In the case of Thornhill, citizens who appealed the Zoning Administrator's LESA score assessment were the appellants.

2. Amenities Assessment (Section 6.4)

The amenities assessment is comprised of seven (7) specific areas to be evaluated as follows:

(a) Size of Site

Pursuant to this Section, zero (0) to six (6) points may be assessed. Thornhill was assessed six (6) points. This assessment was not at issue in the appeal addressed by citizens to the Circuit Court in which Mr. Cassell served as counsel to the BZA.

(b) Adjacent Development

Pursuant to this Section, zero (0) to ten (10) points are assessed. The score for Thornhill assessed by the Zoning Administrator was six (6) points. This assessment was an issue in the appeal addressed by citizens to the Circuit Court in which Mr. Cassell served as counsel to the BZA. Further, this matter was at the center of an appeal to this Honorable Court (*MacElwee, et al. v. Jefferson County Board of Zoning Appeals and Thornhill, LLC*, Supreme Court Docket No. 031896), which was remanded to the Circuit Court following this Court's decision in *Corliss v. Jefferson County Board of Zoning Appeals*, 214 W.Va. 535, 591 S.E.2d 93 (2003) ("*Corliss*"). *Corliss* specifically confirmed the methodology employed by the Zoning Administrator in making the calculation for this category.

(c) Distance to Growth Corridor

Pursuant to this Section, zero (0) to twelve (12) points may be assessed. Thornhill was assessed zero (0) points. This assessment was not at issue in the

appeal addressed by citizens to the Circuit Court in which Mr. Cassell served as counsel to the BZA.

(d) Comprehensive Plan Compatibility

This Section has three (3) subsections. In the Highway Problem Area subsection, zero (0) to twelve (12) points may be assessed. Thornhill was assessed four (4) points. For historical and recreational analysis, Thornhill received one (1) point, while the Opponents of Thornhill claimed two (2) points. For land use compatibility, Thornhill received one (1) point, while the opponents claimed two (2) points.

(e) Proximity to Schools

Pursuant to this Section, zero (0) to nine (9) points may be assessed. Thornhill was assessed nine (9) points. This assessment was not at issue in the appeal addressed by citizens to the Circuit Court in which Mr. Cassell served as counsel to the BZA.

(f) Roadway Adequacy

Pursuant to this Section, zero (0) to six (6) points may be assessed. Thornhill was assessed six (6) points. This assessment was not at issue in the appeal addressed by citizens to the Circuit Court in which Mr. Cassell served as counsel to the BZA.

(g) Emergency Service Availability

This category provides for zero (0) to three (3) points. Thornhill was assessed two (2) points, while the appellants claimed three (3).

E. The Elements of Compatibility in Relation to Which the BZA Has Responsibility

The BZA's duties with respect to compatibility assessment relate to Sections 7.6(b) and 7.6(e) which provide that the BZA conduct a public hearing with regard to issues unresolved following the compatibility meeting. Following the public hearing, the planning staff prepares a report identifying the resolved and unresolved issues. Exhibit C, the staff report, shows fifty-nine (59) unresolved issues. The standard for review by the BZA of unresolved issues is yet another matter, as the Ordinance fails to provide any standard, conditions or guidance to be applied by the BZA in considering the unresolved issues.

Unresolved issues for the purposes of compatibility review by the BZA relate to citizen concerns and/or demands which were not resolved at the compatibility meeting on February 22, 2006. Many of the alleged unresolved issues were inappropriate demands interposed for improper purposes. Unresolved issues number 5, 13 and 21 as shown on Exhibit C clarify the improper nature of some of the demands.

> 5. *Establish a fund with **a $1 million dollar endowment** a monitoring and regulatory body: a 501C3 Thorn Hill River Protection which will continue to monitor the health of the Shenandoah River, Evitts Run, natural springs, existing wells and the proposed treatment plan. The independent body would examine data, report to the public and determine the proper remediation strategies necessary to ensure drinkable water is available.*
>
> 13. ***Compensate the community** for the loss of the environmental and forested area **in the amount of $3.5 million dollars per year** if the forest is obliterated.*

21. ***Contribute $14 million dollars to defray the public debt*** *due to subsidization of infrastructure for this subdivision.*

(Emphasis added.)

The unresolved issues are demands which do not relate at all to **any** aspect of the Zoning Ordinance or the Subdivision Ordinance. More importantly, as the Circuit Court concluded, the unresolved issues are not related to the LESA evaluation required pursuant to Article 6 of the Ordinance. In the Order at page 22, the Circuit Court concluded that "*the compatibility process is not the same subject matter as the LESA process because the compatibility process addresses completely different issues than LESA.*" Further, the Court specifically acknowledged that the BZA did not handle compatibility during Mr. Cassell's tenure. Without question, none of the fifty-nine (59) unresolved issues relates at all to any specific LESA score assessment pursuant to Article 6.

F. The Previous Appeal Related to Adequate Supporting Data

In the citizen appeal in which Mr. Cassell served as counsel for the BZA (*MacElwee v. Jefferson County Board of Zoning Appeals*, Case No. 02-C-40 ("Thornhill I")) the only issue on appeal to the Circuit Court was the adequacy of support data supplied to the Department of Planning, Zoning and Engineering (the "Department") with the application. *See* May 14, 2004 Amended Order, attached hereto as Exhibit F, at Findings of Fact, page 6, i.e., the "*solitary issue*" on appeal was "*whether the support data . . . was adequate.*"

The adequacy of support data was not an issue before the BZA in the instant case and is not an issue at all in the compatibility process pursuant to Article 7 of the Ordinance. Accordingly, the Circuit Court was correct in concluding that facts, circumstances and legal issues were unrelated.

G. Disqualification of Former Government Attorney and Law Firm in West Virginia

West Virginia Rule of Professional Conduct 1.9 prohibits representation "*in the same or substantially related manner*," whether or not the government was the attorney's former employer. Rule 1.11 prohibits former government attorneys from representing clients in a "*matter in which the lawyer participated personally and substantially*" for the government. The interpretation of the terms "*matter*" and "*substantially related matter*" in both rules is critically important in understanding the prohibitions.

1. Rule 1.11

West Virginia cases involving disqualification of former government attorneys pursuant to West Virginia Rules of Professional Conduct, Rule 1.11, have involved criminal cases in which either (1) the defendant's former attorney moved to the prosecutor's office, or (2) the defendant's appointed counsel was previously in the prosecutor's office. Obviously, these cases have limited application to the Thornhill matter. The cases do, however, indicate that proper screening of an attorney will likely insulate the firm or government office from disqualification. *See State ex rel. Tyler v. MacQueen*, 447 S.E.2d 289 (1994); *see*

also Bayles v. Hedrick, 188 W.Va. 47 (1992). Proper screening pursuant to the rule includes prompt written notice to the appropriate government agency to enable it to ascertain compliance with the rule. *See* W.Va.Rules Prof. Conduct, Rule 1.11(a). Since the compatibility process was not the same "*matter*" as the prior Thornhill appeal to the BZA, screening was not required by the Rule.

2. Rule 1.9

This Court has addressed the application of Rule 1.9's prohibition against representing a client in the same or substantially related matter if the matter is materially adverse to the interests of a former client. However, the cases do not involve former government attorneys.

As noted above, whether or not representation involves a "*substantially related matter*," as contemplated by Rule 1.9, depends on the facts, circumstances and legal issues of the two representations. *See State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 211 W.Va. 423, 426 (2002). Further, the analysis must be conducted on a case-by-case basis. *See id.* The *Ogden* court noted that two matters are "*substantially related*" pursuant to Rule 1.9(a) if "*there is a substantial risk that representation of the present client will involve the use of confidential information acquired in the course of representing the former client* ***unless that information has become generally known.***"[7] *Id.* at 427 (citations

[7] Thornhill contends that the issues before the BZA in Thornhill I and in *MacElwee* appeal were all generally known and a matter of public record. In fact, the briefs before this Honorable Court in *MacElwee, et al. v. Jefferson County Board of Zoning Appeals and Thornhill*, Docket No. 031896, make it clear that the

omitted)(emphasis added). In *Ogden II*, this court cautioned over-inclusive application of the rule, and recognized that the passage of time is a relevant factor to consider in determining whether a substantial relationship exists.

The burden of establishing that a substantially related matter exists is on the former client. Once established, the court will presume that confidential information was divulged during the prior representation. *See id.* at 426.

3. ***Cosenza v. Hill* Can Be Distinguished**

This Court addressed a Rule 1.9 conflict of interest in *Cosenza v. Hill*, 216 W.Va. 482 (2004), in which an attorney switched law firms and began representing a client of his previous law firm. The attorney claimed that he had not worked on the case and had acquired no knowledge during his tenure at his old firm. Nevertheless, the Court upheld the lower court's determination that, even if nothing improper transpired, the "*appearance of impropriety standard*" should be applied. Accordingly, the lawyer was disqualified because his continued representation would give rise to an apparent conflict of interest or appearance of impropriety based upon the lawyer's confidential relationship with an opposing party. *See id.* at 488.

The "*appearance of impropriety*" standard is not in the rule. It was formerly in Cannon 9 of the ABA Model Code of Professional Responsibility.

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issues involved in Mr. Cassell's prior representation of the BZA, in relation to Thornhill, were clearly part of the public record. Further, those briefs will demonstrate that the interest of Thornhill and the BZA were aligned while Thornhill and the BZA were adverse to citizens who challenged the BZA's conclusions on the issue of adequate support data.

The difficulty in applying the standard is discussed in the comments of West Virginia Rules of Professional Conduct, Rule 1.10 as follows:

> *First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since 'impropriety' is undefined, the term 'appearance of impropriety' is question-begging.*

More importantly, *Cosenza* was clearly the "*same matter*" because a single lawsuit regarding the precise same "*subject matter*" was pending when the attorney formerly employed by defense counsel's firm became employed by plaintiff counsel's firm. The distinction between *Cosenza* and Mr. Cassell's prior representation of the BZA is significant, because the prior matters discussed above are not the "*same matter*" or "*substantially related to*" the compatibility process.

The BZA complains in its Petition that the Circuit Court improperly concluded that government attorneys who provide general advice regarding the requirements of an ordinance would be treated differently than private parties. The Circuit Court predicted that this Honorable Court would "*not apply the strict Cosenza standard to government attorneys, especially one who represented a public body, such as Mr. Cassell.*" *See* Order at page 13. Unfortunately, when complaining about this conclusion in the Petition, the BZA did not include the following sentence from the Order, which provides as follows:

> *Finally, even if the Supreme Court applies the Cosenza standard to government attorneys, the BZA did not show, to this Court's satisfaction, that Mr. Cassell represents Thornhill in a substantially related matter, which is the first prong of Cosenza.*

Order at pages 13-14.

H. Disqualification of Former Government Attorney and Law Firm in Other Jurisdictions

Because there are few cases from this Court applying Rules 1.9 and 1.11 to former government attorneys, it is useful to look at other jurisdictions' interpretation of the rules in this context.

1. District of Columbia

The District of Columbia Court of Appeals has systematically broken down the necessary inquiries when determining if a former government attorney should be disqualified for conflict of interest pursuant to Rule 1.11. The first question that jurisdiction asked is:

(a) What is a "matter" for the purposes of Rule 1.11(a)?

The D.C. court applied the definition from the American Bar Association's Committee on Professional Ethics and Grievances, which described a matter as "*a discrete and isolatable transaction or set of transactions between identifiable parties.*" *In re Sofaer*, 728 A.2d 625, 642 (D.C. 1999)(citations omitted). Accordingly, the same issue of fact involving the same parties and the same legal issues and conduct is the same matter. *See id.* at 643.

The second question in the Rule 1.11 analysis is:

(b) What is participation in a matter "personally and substantially as a public officer or employee?

The D.C. court looked to the federal criminal statute banning conflict of interest in the context of a disciplinary proceeding, which requires involvement that is significant to the matter, or forms a basis for a reasonable appearance of such significance. It also "*requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.*" *Id.* The court also looked to the D.C. Bar Legal Ethics Committee's interpretation of the preceding rule, which said that a matter was personal and substantial when it was "direct, extensive and substantive, not peripheral, clerical or formal." *Id.*

Thirdly, the court asked:

(c) What is a "substantially related" matter?

The court noted an earlier D.C. opinion interpreting the rule's predecessor, and the three-part test that is generally applied. It is as follows: (1) the trial court must make a factual reconstruction of the scope of the prior representation; (2) if the court determines that the factual contexts overlap, the court must determine whether it is reasonable to infer that the former government attorney may have had access to confidential information; and (3) whether the confidential information is relevant to the issues raised in the litigation pending against the former client. If all three conditions are met, the matters will be deemed substantially related. Then, the burden of producing evidence shifts to the former government attorney,

who must rebut the presumption by showing that he could not have gained access to information during the first representation that might be useful against the government.

The above principles were developed in *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984). In *Brown*, an attorney who formerly represented the Zoning Commission was representing a developer with regard to a special exception for parking spaces. While the attorney was with the Zoning Commission, the developer challenged certain zoning restrictions applied to his property. The former government attorney later represented the same developer in his quest to acquire a special exception for additional parking for the same piece of property. Although the same property was involved, the court held that the former litigation did not involve parking; therefore, the matters were not substantially related for purposes of disqualification. This conclusion was reached despite the government presenting a prima facie case of disqualification—all land use transactions were directed at the same property in a unique, relatively small zone, involving the same owner and the D.C. government, thus providing a sufficient factual overlap for a reasonable person to infer that the attorneys may have had access to information that could be legally relevant to or otherwise useful in the special exception case at issue. The burden of producing evidence to rebut the inference then shifted to the law firm, which they met.

Finally, the court concluded that, while other attorneys in the office could have handled the case, it was unnecessary to screen the former government attorney because the matters were not substantially related.

2. Arizona

In interpreting "*substantially*" and "*personally*" participating under Rule 1.11, the Supreme Court of Arizona determined that the former government lawyer must have been aware of the details of a matter and have some hand in its resolution and day-to-day progress. *See Security General Life Ins. Co. v. County of Yuma,* 718 P.2d 985 (1986). Further, "*matter*" was deemed to mean the same lawsuit or litigation. In *Security General*, the Supreme Court of Arizona held that Rule 1.11 would not disqualify the former government attorney because when the attorney served as Director of Department of Insurance, he had no personal knowledge of matters involving the insurer who later became his client. Other people within the department had conducted investigations related to the insurer, and the attorney had merely signed orders that other individuals within the department had prepared.

3. Texas

Texas believes that "*disqualification is a severe remedy*;" therefore, the Court of Appeals "*discourage[s] the use of motions to disqualify as dilatory trial tactics*," cautioning trial courts to adhere to an exacting standard when considering such motions. *In re Drake*, 2006 WL 333993, *2 (Tx. Ct. App. 2006)(*citing Spears v. Fourth Court of Appeals*, 797 S.W.2d 854, 656 (Tx. 1990))(internal

quotation marks omitted). The standard is not satisfied by mere allegations of unethical conduct or evidence showing only a remote possibility of violation of the Rules of Professional Conduct. *See id.*

The court in *Drake* interpreted a Texas rule of conduct similar to West Virginia's Rule 1.9. The court determined that a party seeking disqualification must show that "*during the existence of the attorney-client relationship, factual matters were involved that are so related to the facts in the pending litigation that a genuine threat now exists that confidences revealed to a former attorney will be divulged to his present adversary.*" *Id.* The moving party has a heavy burden to provide the trial court with sufficient information to allow it to engage in a painstaking analysis of the facts. *See id.* "*Superficial resemblances among issues do not rise to the level of substantial relationship.*" *Id.* If the movant meets his burden, by delineating the subject matter, issues, and causes of action present in the former litigation, then there is a conclusive presumption that confidences and secrets were imparted during the attorney-client relationship. *See id.*

In *Drake*, an attorney who had served for more than twenty years in the county's appraisal district was not disqualified from representing clients in valuation issues similar to those he had addressed as an appraiser because the issues to be litigated were not related to the specific facts in any prior case in which the lawyer represented the appraisal district. Further, the lawyer had no confidential information regarding valuation of his clients' properties and all information in the appraisal district's files was discoverable.

4. Louisiana

In *Walker v. Department of Transportation and Develop.*, 817 So.2d 57 (La. 2002), the Supreme Court of Louisiana had the opportunity to interpret both Rules 1.9 and 1.11. In its Rule 1.9 analysis, the court looked to federal district courts' interpretation of the term "*substantially related.*" It noted that the District of Kansas court concluded that the term includes cases that "*involve the same client and the same matters or transactions in question [and they must be] relatively interconnected or reveal the client's pattern of conduct.*" *Id.* at 60. The Louisiana court went further to deem two matters substantially related only when "*they are so interrelated both in fact and substance that a reasonable person would not be able to disassociate the two.*" *Id.* at 62. In stressing that the rule should be narrowly interpreted, the court stated that representing a party against a former client on the same type of case, without more, is insufficient to disqualify the attorney under Rule 1.9.

The *Walker* court then looked to Rule 1.11, and determined that in order to disqualify a former government attorney, the moving party must show that the attorney "*gained confidential information that is relevant to the case he is now handling and which can be used against and to the prejudice of the State.*" *Id.* at 63.

Applying the standards articulated, the court held that the attorney who formerly represented the Department of Transportation was not disqualified from representing clients in personal injury actions against the Department, even though

cases involved the type of suits he defended as counsel for Department. The cases were deemed not substantially related under Rule 1.9 because they were either filed after the attorney left the government or the attorney had no knowledge of the facts of the cases while in the government's employment. Further, there was no evidence that the attorney had acquired confidential information that would justify disqualification under Rule 1.11.

5. United States Court of International Trade

In *National Bonded Warehouse Ass'n, Inc. v. United States*, 718 F.Supp 590, 592 (Ct. Int'l Trade 1989), the Court of International Trade noted that disqualification is an extreme remedy that should not be invoked absent strong and specific proof of actual conflict. The court rejected the "*appearance of impropriety*" standard, instead requiring a showing of "*facts that present a real risk that the judicial process will be tainted.*" *Id.*

The case involved a former assistant chief counsel for the Customs Service whose duties had included advice on establishing and implementing a bonded warehouse user fee program. When the attorney left the government, the attorney's law firm aided in a client's challenge of the same program. In interpreting the predecessor to Rule 1.11, the court looked to whether rulemaking activity can be considered the same "*matter*" to justify disqualification of a former government attorney. The court held that "*only when the rulemaking activity is narrow in scope and is confined to specified issues and identifiable parties such that it may be properly characterized as 'quasi-judicial' in nature, will a*

rulemaking proceeding and subsequent litigation be considered synonymous to the extent that it constitutes the same 'matter.'" *Id.* at 596 (internal citations omitted). Because the facts showed only a technical conflict and there was no evidence of confidential information being acquired by the former government attorney—thus there was no real harm to the parties or the judicial process—the court refused to disqualify the attorney.

I. The Standard for Disqualification is High

When a litigant seeks the disqualification of opposing counsel, a court must look carefully at the allegations and require the moving party to prove an appropriate basis for disqualification. Although this is not a criminal proceeding, the presumption in favor of a defendant's counsel in civil proceedings is likewise grounded in constitutional principles.

Thornhill respectfully submits that secrets are not transmitted to government lawyers representing Boards of Zoning Appeal — and the BZA has not asserted that any such secrets or confidences were shared. Even if such secrets were shared, they could not and would not be substantially related to the issues joined in 2006 at compatibility.

This Court has acknowledged that motions to disqualify have been used as techniques of harassment. Quoting the Seventh Circuit in *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721-22 (1982), this Court stated the concern:

> *Disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their choosing . . . [Such] motions should be viewed with extreme caution for they can be misused as techniques of harassment. Garlow* at 116.

J. The Issue of "*Negotiations for Employment*" Was Not Raised in the Motion to Disqualify Nor in the Evidence Presented to the Circuit Court

In the instant Petition, it is asserted that the Circuit Court committed error by failing to conclude that Mr. Cassell violated Rule 1.11(c) in relation to alleged negotiations for employment. This argument is interesting because the Motion does not raise this issue at all. Further, at the lengthy evidentiary hearing, no evidence at all was presented about any negotiations of any nature between Mr. Cassell and Campbell Miller Zimmerman, P.C.

In the Petition, the BZA admits that the issue was not presented to the Circuit Court:

> *The Circuit Court initiated the discussion of Mr. Cassell's negotiations during the November 21, 2006 evidentiary hearing. Although* ***the BZA did not address the topic of whether Mr. Cassell did negotiate*** *for private employment with Campbell, Miller, Zimmerman while representing the BZA, if such negotiation did occur, the only appropriate remedy is disqualification of Mr. Cassell and his firm.* (Emphasis added.)

See Petition at page 23.

Without question, the BZA had the burden of proof, both before the Circuit Court and in the Petition with regard to the issue of disqualification. While

acknowledging that it presented no evidence on this issue to the Circuit Court (because no such evidence exists), the BZA seeks an extraordinary remedy, notwithstanding the absence of pleadings or evidence in the Circuit Court in support of this issue. This is simply inappropriate.

V. CONCLUSION

Consistent with express authority in *Ogden I and II,* the Circuit Court conducted an evaluation of the facts, circumstances and legal issues relevant to the LESA process and appeals wherein Mr. Cassell served as counsel for the BZA; and compared such facts, circumstances and legal issues to the compatibility process and to the unresolved issues which were the subject of the matters presented to the BZA in May of 2006.

Because the LESA process and appeals related thereto were completely unrelated to the compatibility process, the Circuit Court determined that there was no substantial relationship between the two matters and the Motion was denied. The Circuit Court also noted that the BZA did not have responsibility for unresolved issues in the compatibility process when Mr. Cassell served as their counsel, and there was no evidence of any confidences or secrets relevant to the compatibility process presented at hearing.

The issues raised in the Petition do not create concerns that the Circuit Court of Jefferson County is ignoring well-established standards from this Court, which ought be corrected, independent of disputed facts. Simply stated, the Circuit Court applied well-established principles to the disputed facts, and

concluded that the matters were not substantially related. For these reasons, the Petition for Writ of Prohibition should be denied and the Circuit Court of Jefferson County should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service:	Federal Express
Date of Service:	July 17, 2007
Persons served and address:	Honorable Christopher C. Wilkes Circuit Judge, 23rd Judicial Circuit Berkeley County Courthouse 380 West South Street, Suite 4400 Martinsburg, West Virginia 25401 Brandon C.H. Sims, Esquire Stephanie F. Grove, Esquire Office of the Prosecuting Attorney 110 North George Street Charles Town, West Virginia 25414
Item Served:	Highland Farm, LLC and Thornhill, LLC's Response to Rule to Show Cause

James P. Campbell

S:\Civil\Clients\Thornhill\Thornhill III\Created\Pleadings\Answer to Rule to Show Cause.doc